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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6745

JAMES RICHARD PATRICK, Petitioner

V.

THE STATE OF GEORGIA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

ATTORNEY FOR PETITIONER:

Deryl D. Dantzler

c/o Mercer Law School

Macon, Georgia 31207

(912) 745-6811, ext. 297

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Allen v. State, 233 Ga. 200

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JAMES RICHARD PATRICK, Petitioner

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THE STATE OF GEORGIA, Respondent

PETITION

FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The petitioner James Richard Patrick respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia affirming petitioner's conviction of the offense of murder and sentence of death entered in this proceeding on January 24, 1980.

OPINION BELOW

The opinion of the Supreme Court of Georgia is not yet officially reported but is set out in an appendix to this petition.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 24, 1980. A timely motion for rehearing was denied on March 13, 1980 and this petition is filed within ninty days of that date.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (3), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Georgia Supreme Court has adopted a construction of the Georgia death penalty act which allows the arbitrary and capricious infliction of capital punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and which varies substantially from the enactment of the Georgia Legislature heretofor approved by this Court.

2. Whether the death penalty Constitutionally may be imposed in Georgia upon a jury's finding that a murder involved "an aggravated battery to the victim" and a jury instruction that the death penalty could be assessed if "the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim" where boths the verdict and instruction omit reference to statutory requirements of depravity of mind and torture to the victim.

3. Whether the death penalty Constitutionally may be imposed in Georgia upon a jury's finding that a murder occured during the course of a kidnapping when the relevant statutory aggravating circumstance specifies a murder committed "during the course of another capital felony" and kidnapping, as defined in the trial court's instruction, is not a capital felony by statute in Georgia.

4. Whether the failure of the Supreme Court of Georgia to conduct its proportionality review in accordance with statutory standards unconstitutionally deprived petitioner of legislative protectionsagainst arbitrary and capricious imposition of capital punishment.

STATUTES INVOLVED

In addition to the Eighth and Fourteenth Amendments to the Constitution of the United States, this case involves the following Georgia Statutes:

§26-3102 Capital offenses; jury verdict and sentence

Where, upon a trial by jury, a person is convicted of an offense punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed.

.....

§27-2534.1 Mitigating and aggravating circumstances; death penalty

.....

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be authorized by the evidence:

.....

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

.....

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

§27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final inthe trial court, the sentence

shall be reviewed on the record by the Supreme Court of Georgia.

.....

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether... the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to submit oral argument to the court.

(e) The court shall include in its decision a reference to those cases which it took into consideration. .....

(f) There shall be an assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate.

.....

STATEMENT OF THE CASE

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW:

All federal questions raised herein were first presented to the Supreme Court of Georgia. The First Question Presented is essentially a summary issue including all of the others listed thereafter.

The Second Question was raised below by Enumeration of Error Eleven and was decided adversely to petitioner in Division Eleven of the opinion below. Although error was specifically argued on account of the trial court's incomplete instruction the Georgia court's opinion merely held that evidence would have supported a complete charge on the seventh aggravating circumstance. This omission was pointed out on motion for rehearing, but that Division of the opinion was unchanged.

The Third Question was raised below by Enumeration of Error Ten. The original opinion below decided this issue adversely to petitioner; but, following the filing of the motion for rehearing, Division Ten of the opinion below was rewritten to avoid deciding the issue.

The Fourth Question Presented was first raised on motion for rehearing which was petitioner's first opportunity to complain of the method employed to assemble cases for the review of proportionality. Prior to the issuance of the court's first opinion, petitioner had no basis for objecting to any failure of the court to follow the mandate of the statute. Rehearing was denied and this issue was not addressed below even though, as indicated above, other portions of the opinion were rewritten. The portions of petitioner's motion for rehearing relevant to this issue are copied in the Appendix to this petition.

FACTS IN EVIDENCE

Petitioner was convicted of the offense of murder and sentenced to death. The summary of evidence included in the opinion of the Supreme Court of Georgia contains a number of inaccuracies. For this reason, a detailed factual summary with record references is set out in the Appendix.

All issues raised in this petition concern the sentencing phaze of the trial and the appellate review of the death sentence imposed. The trial court's entire charge to the jury on sentencing is printed in the Appendix. Specific attention is called to the two times in the instructions in which the jury was informed that the death penalty could be assessed if the jury found either of the following aggravating circumstances:

I.

The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: Kidnapping.

II.

The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim.

The same language was used in the written instructions required under the statute. The jury verdict was:

We find the following aggravating circumstances: kidnapping and aggravated battery to the victim and we recommend the death penalty. (T-1278, R-3)

REASONS FOR GRANTING THE WRIT

AS TO THE SEVENTH AGGRAVATING CIRCUMSTANCE

In the recent case of Godfrey v. Georgia, ___U.S.___ No. 78-6899, decided May 19, 1980, this Court considered Georgia's seventh aggravating circumstance (Ga. Code §27-2534.1 (b)(7)) and reversed a death sentence imposed thereunder. The present case presents an even more egregious construction of the same provision. In this case, the Georgia Supreme Court has approved a jury instruction which, contrary to the warning of this Court in Gregg v. Georgia, 428 U.S. 153, literally allows the death penalty for any murder.

Whereas the jury instruction in Godfrey included a complete statement of the seventh circumstance the verdict specified only a portion thereof. Here, both the instruction and the verdict were incomplete. Under the charge, the jury was authorized to impose the death penalty solely upon a finding that an aggravated battery occurred. The elements of torture to the victim* and depravity of mind were not mentioned to the jury. Nor were they required to separatly find that the offense was "outrageously or wantonly vile, horrible or inhuman" since they were instructed to conclude this characterization if they found an aggravated battery. This Court has previously noted that all murders may involve an aggravated battery (Godfrey). This type instruction provides no basis whatever for a jury to distingush between those offenses which are deserving of the extreme penalty and those which are not.

---

* The failure of the trial court to include torture in the charge was supported by the evidence wherein the medical examiner testified that any one of the blows inflicted must necessarily have rendered the victim unconscious (T-1010)

The dissenting opinionof Mr. Justice White in Godfrey states that

> ...the Georgia Supreme Court understood that [§(b)(7)] applied in its entirity, just as in the past it has insisted that the provision be read as a whole and not be applied disjunctively.

This case demonstrates that the Georgia Supreme Court has now abandoned this position. The disjunctive application of Section (b)(7) here indicates the complete unwillingness of that court to narrowly construe the provision in keeping with Constitutional requirements. This Court could remand this case for reconsideration in light of Godfrey. However, given this extreme example of the Georgia court's enthusiastically broad interpretation of the statute, certiorari should be granted and the seventh circumstance held invalid once and for all.

AS TO THE SECOND AGGRAVATING CIRCUMSTANCE

In this case, the jury assesed the death penalty on two different grounds. In addition to the basis discussed above, the jury found the death penalty to be justified on the basis of a kidnapping. The Georgia Supreme Court failed to clearly reverse this finding or disapprove the instruction given. Insofar as the jury verdict is allowed to stand on this ground petitioner's sentence of death is based on a judicially created aggravating circumstance not specified by the legislature.

Georgia Code §27-2534(b)(2) lists as a statutory aggravating circumstance that " the offense of murder... was committed while the offender was engaged in the commission of another capital felony..." Kidnapping, as defined in the trial court's charge in the language of Georgia Code §26-1311(a) (T-1272) is not a capital offense (Allen v. State, 233 Ga. 200, 202; Weaver v. State, 137 Ga. App. 470). Whether or not the evidence might have supported a charge on kidnapping with bodily injury or for ransome, which are denominated capital

offenses, is irrelevant. The jury was not required to weigh any evidence which might have ixisted as to those offenses.

AS TO THE PROPORTIONALITY REVIEW

One of the provisions of the post-Furman death statute in Georgia with which this Court has been most impressed (eg. Gregg v. Georgia, 428 U.S. 153 and the dissenting opinion of Mr. Justice White in Godfrey v. Georgia, No. 78-6899) is the elaborate statutory scheme for appellate review of the proportionality a death sentence as compared to similar cases. The fact is that the statutory scheme is not being followed by the Supreme Court of Georgia.

> Georgia Code §27-2537(f) requires that the court, Shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate

in order to effect the required comparison to determine,

> [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.
>
> (Georgia Code §27-2537(c)(3)

Disregarding this command, the Georgia court, as it did in this case, compares death sentences only to " the cases appealed to [that] court since January 1, 1970, in which death or life sentences were imposed" (opinion below, pg.17).

A specific demand that the statutory procedure be followed was made by way of motion for rehearing pointing out that failure to do so would result in arbitrary and capricious sentencing in violation of the intent of the Georgia Legislature and the Constitutional decisions of this Court. Rehearing was denied.

The failure of the group of comparison cases to include non-appealed life sentences --especially those resulting from plea-bargains and other guilty pleas -- results in a

sample biased in favor of death. The impressive legislative scheme thus carries an empty promise of proportionate sentencing. To say that a given case is similar to others in which the death penalty was imposed means little if the case is also similar to many in which it was not. The opportunity for arbitrary and capricious sentencing condemned in Furman v. Georgia, 408 U.S. 238 (1972) is thus reintroduced into a statutory scheme which facially avoids those faults. As thus applied, the Georgia death penalty Act violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

The Writ of Certiorari should issue and the judgment of the Georgia Supreme Court affirming petitioner's death sentence should be reversed.

Respectfully submitted,

Deryl D. Dantzler
c/o Mercer Law School
Macon, Georgia 31207
(912) 745-6811, ext. 297

attorney for petitioner

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APPENDIX - DEATH PENALTY INSTRUCTIONS

THE COURT: Ladies and gentlemen, the defendant in this case has been found guilty of the offense of murder, and it is now your duty to make certain decisions that will affect the sentence which the Court will impose as punishment for that offense.

Under the law of this State every person found guilty of murder shall be punished by death or imprisonment for life.

I charge you that although, under the law of Georgia, the Judge, that is, the Court, will fix the sentence, the determinations you will now make will affect the sentence which will be prescribed.

Your responsibility at this stage of the trial is to determine whether any mitigating or aggravating circumstances existed at the time the murder was committed, which would authorize you to recommend the death penalty for the defendant.

Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following statutory aggravating circumstances existed beyond a reasonable doubt:

I.

"The offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Kidnapping."

and/or

II.

"The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim."

Now, ladies and gentlemen, the law defines kidnapping thusly: "A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant, and holds that person against his will."

The law defines aggravated battery: "A person commits aggravated battery when he maliciously causes bodily harm to another, by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body, or a member thereof."

If you find, ladies and gentlemen, that either of these aggravating circumstances existed beyond a reasonable doubt, and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.

On the other hand, you can see fit, whether aggravating circumstances existed or not to recommend mercy for the defendant; if this should be your finding, then the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determinations, you are

authorized to consider all the evidence received throughout this trial presented by the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those which increase the guilt or the enormity of the offense or add to its injurious consequences.

Now, ladies and gentlemen, the form of your verdict fixing punishment would be one of the following and should read:

I.

"The offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: Kidnapping, and we recommend the death penalty."

and/or

II.

"The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the

victim, and we recommend the death penalty."

Now, ladies and gentlemen, furthermore the form of your verdict may be:

I.

"The offense of murder was committed while the offender was engaged in the commission of another felony, to-wit: Kidnapping, and we do not recommend the death penalty."

and/or

II.

"The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim, and we do not recommend the death penalty."

Now, ladies and gentlemen, even though you find that statutory aggravating circumstances do exist, you may refuse to recommend the death penalty, as I've stated, in which event the defendant would receive a sentence of life imprisonment. Should you fail to find aggravating circumstances, then the form of your verdict would be, "We, the jury, recommend mercy."

Should this be your verdict, it would mean that the Court would sentence the defendant to life imprisonment.

Your decision must be unanimous, ladies and gentlemen, must be in writing, dated and signed by the foreman.

Now, ladies and gentlemen, the law requires that I give you the instructions that I have just given you in writing which you will take out with you so that you may read and refresh your memory as to the duties and responsibilities, and the options that you have.

Now, you will have a choice of three different verdicts, ladies and gentlemen, and these verdicts have been prepared in writing, you will take them out so that you may use the appropriate verdict.

One is, "The offense of murder was commited while the defendant was engaged in the commission of another capital felony, to-wit: Kidnapping," and/or "The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim."

Verdict: "We, the jury, find the following aggravating circumstances, and we recommend the death penalty, this blank day of October, 1977."

The other form of your verdict would be: "The offense of murder was committed while the defendant was engaged in the commission of another capital felony, to-wit: Kidnapping," and/or "The offense of murder was outrageously

or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim."

Verdict: "We, the jury, find the following aggravating circumstances, and we do not recommend the death penalty, this blank day of October, 1977."

The third form of your verdict is, "We, the jury, having found the defendant guilty of the offense of murder, and we having found no aggravating circumstances, we, the jury, recommend mercy, this blank day of October, 1977."

And whichever verdict you use, ladies and gentlemen, must be dated, and signed by your foreman, and returned into Court.

I ask that you retire at this time to consider your verdict, ladies and gentlemen.

(At 4:45 o'clock p.m., the jury leaves the Courtroom.)

In the Supreme Court of Georgia

Decided: JAN 24 1980

35200. PATRICK v. STATE

BOWLES, Justice.

James Richard Patrick was indicted by the grand jury of Muscogee County for the January 10, 1977 murder of Gertruda "Truly" Johnson. Following a jury trial, Patrick was found guilty. Upon the jury's finding of the statutory aggravating circumstances of kidnapping and aggravated battery to the victim, Patrick was sentenced to death. The case is here on direct appeal and for review of the death sentence.

There was evidence presented from which the jury was authorized to find the following facts: On the afternoon of January 10, 1977, Truly Johnson, a 15 year old high school student, rode with a friend to a local convenience store to buy a package of cigarettes. This was the last time Truly was seen alive. The appellant owned and operated a record shop across the street from the convenience store.

On January 11, 1977, appellant asked Cathy Granger to go into the woods with him to walk the dog. Appellant's wife and Cathy

Granger's husband were cousins. The two couples lived in appellant's house. Appellant and Mrs. Granger went on their walk in the woods behind appellant's store, near the area where Truly's body was subsequently found. They stopped several times to shoot birds and targets with a pellet gun.

Upon returning to appellant's record shop, Mrs. Granger realized that she was missing her wallet and car keys. She returned to the woods to look for them. While she was searching, she heard appellant scream and call out to her because he had uncovered a body in the clearing.

Appellant gave varying accounts of how he found the body. He told Mrs. Granger that his dog had found the body and was tugging on a portion of the clothes. He told James Bishop that the dog was tugging on the pants leg. Two days later, in making a statement to the police, appellant said he saw a bit of clothing under a pile of leaves and he then went over and uncovered the body. This was also appellant's story at trial.

After telling Mrs. Granger about his discovery, Patrick and Mrs. Granger ran to a nearby barbeque restaurant operated by Cleo Chevalier and notified the police. Appellant, Mrs. Granger,

Chevalier and James Bishop, a local shopkeeper, returned to the clearing where the body was found. Both Bishop and Chevalier testified that when they arrived, the body was completely covered with leaves.

Police investigation revealed that at the time her body was found, Truly was wearing both shoes but only one sock. The other sock was found underneath the body. She was naked from the waist up except for a jacket. Her sweater had been used to tie her hands to a tree. Her brassiere was found tied around a tree next to the body. Her panties were on inside out, with leaves inside.

Dr. Joe M. Webber, Medical Examiner for Muscogee County testified that the cause of death was cerebral shock brought on by any one of three blows to the victim's head. The body suffered extensive trauma to the right side of the head, neck and upper torso, shoulders and chest, with multiple lacerations on the face. There was also internal injuries to the groin area. The injuries were so extensive that Truly's father did not recognize her from the exhibits displaying her as she was found.

On February 1, 1979, appellant and a female accomplice kidnapped Kelly Leigh Maley for ransom. Kelly was a thirteen year old

junior high school student, picked up on her way home from school. Kelly was taken to an apartment where she was held until the ransom was paid. During this time, appellant told Kelly that he had kidnapped and killed Truly Johnson. At trial, appellant admitted that he had told Kelly this, but that he did so only trying to scare her. Appellant also told Kelly he would kill her if her parents did not pay the ransom. Appellant was convicted for the kidnapping of Kelly Maley.

1. In his first enumeration of error, appellant complains that the trial court erred in failing to excuse for cause Jurors Bickerstaff and Laudermilk who testified on voir dire that they would not consider a life sentence in the event of a conviction.

Juror Bickerstaff was directly asked if, following a verdict of guilty, he would consider both the death penalty and life imprisonment.

"Q. ...could you if you felt that it was a just verdict based on the law as given you in charge by the court, and the evidence that had been produced to you, could you vote to impose the death penalty?

"A. Yes, sir.

"Q. And contrary-wise, if you felt the appropriate punishment was life in the penitentiary, could you vote to impose a life penalty on him?

"A. Right."

Juror Laudermilk answered the same two questions in the same way, indicating that he would consider both life imprisonment and the death penalty should the defendant be found guilty of murder.

Having examined the entire voir dire examination of the two prospective jurors we conclude that no error was committed by the trial court in failing t excuse the two jurors for cause.

2. Appellant complains that the trial court erred in preventing voir dire of a publicity exposed juror concerning his prejudgment of issues in this case.

The juror was asked about any news coverage he had seen or heard about in appellant's case and the influence it had had on him in connecting appellant with the death of Truly Johnson. He answered that he knew of no connection between appellant and the case other than the accusation.

Thereafter, appellant's counsel asked, "[i[n connection with the circumstances that you have read and heard about in this case,

can you tell me what your opinion of the appropriateness or inappropriateness of the death penalty and the State's request therefor?" In sustaining the State's objection, the court ruled the question was impermissible because it called on the witness to prejudge the case. We agree.

While Code Ann. § 59-705 permits broad questioning of a potential juror, it does not allow counsel for either side to ask the juror to guess what his verdict will be before any evidence has been presented. The question asked was designed to have the juror prejudge the case based on hearsay. The refusal to allow such a question was not an abuse of the court's discretion. Pinion v. State, 225 Ga. 36(4) (165 SE2d 708) (1969).

3. Appellant complains that the trial court erred in preventing voir dire of publicity exposed jurors concerning their perceptions of the biases of the community in connection with the case. During voir dire appellant's counsel was prevented from asking jurors who had been exposed to pretrial publicity, "Do you have an opinion as to what most other people think about whether or not the defendant in this case is guilty?"

We find no error in the trial court's refusal to allow the question. Pinion v. State, supra. Extensive voir dire was

allowed as it pertained to the juror's own personal feelings and biases. However, we find no provision of Code Ann. § 59-705 which permits questioning as to other peoples' feelings. Such responses would be merely hearsay, and highly unreliable. There was no abuse of the trial court's discretion.

4. Appellant complains that the trial court erred by commenting adversely on his credibility during the State's cross-examination of him in violation of Code Ann. § 81-1104. In reviewing the transcript, we find no error.

Appellant was being questioned as to whether he had maintained innocence to the kidnapping of Kelly Maley, after entering a plea of guilty to the offense. Appellant's counsel objected to the question as being irrelevant. In ruling on the objection, the trial judge said, "I think that goes to his credibility..." Appellant concedes in his brief that it would not have been error for the judge to state, "It goes to his credibility."

A mere statement that evidence is being admitted for purpose of impeachment does not constitute expression of an opinion by the court that the witness would thereby be impeached. Beckworth v. State, 183 Ga. 871(5) (190 SE 184) (1937). By prefacing his

remark by the words "I think", the trial judge did not change the ruling on the objection to an opinion as to appellant's credibility.

5. Appellant complains that the court erred in sustaining an objection to testimony by the defendant concerning his emotions. Appellant was asked on direct examination how he was feeling at that moment. He testified that he was scared. Appellant's counsel then asked him to elaborate on that answer by asking him if he was nervous. State's counsel objected and the trial court sustained the objection, ruling that the jury could gather this information from watching appellant's demeanor on the stand.

Later during direct-examination, appellant was asked how he felt when he saw the body of Truly Johnson uncovered. The State objected, and the trial court ruled that appellant could testify as to what he did or said, but not as to his emotions at the time. Appellant was allowed to testify that he was not faking any emotions on January 10 and 11, 1977, and that his responses were natural and not contrived.

We find no error in excluding appellant's testimony as to his emotions. Appellant failed to show that the evidence was relevant to the issues in the case. On appeal, appellant has

cited no law, nor do we know of any, which would have permitted a description of emotions by the witness while testifying.

6. Appellant complains that the evidence was insufficient as a matter of law to support a verdict of guilty. We find, however, that there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia _____ U. S. _____ (99 SC 2781, 61 LEd2d 560) (1979).

7. Appellant complains that the court erred in failing to instruct the jury, without request, on alibi. We do not agree.

"Alibi, as a defense involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence." Code Ann. § 38-122. In reviewing the evidence in this case, we find nothing that would have prevented appellant from being present at the scene of the murder at the time of its commission. Appellant gave a general statement as to his whereabouts on the afternoon of January 10, 1977, but no specific times and places. He admits that he was in close proximity to the clearing where the body was found for much of the afternoon. As

appellant was vague as to the exact time he was at the various locations mentioned, his testimony, even if believed, would not have made it impossible for him to have committed the crime. It was not error to fail to charge on alibi. Copeland v. State, 241 Ga. 370 (245 SE2d 642) (1978); Bryant v. State, 229 Ga. 60(2) (189 SE2d 435) (1972); Weaver v. State, 199 Ga. 267(2) (34 SE2d 163) (1945).

8. Appellant complains that the court erred in its charge on the offense of murder in that the charge shifted to the appellant the burden of disproving malice. In support of this contention appellant cires Sandstrom v. Montana, ____ U. S. _____ (99 SC 2450 ___ LEd2d ____) (1979). The following charge was complained of, "The law of the State of Georgia states that a person commits murder when he unlawfully, and with malice aforethought, either express or implied, causes the death of another human being.... Malice shall be implied when no considerable provocation appears, and when all of the circumstances of the killing show an abandoned and a malignant heart. Now, ladies and gentlemen, the law presumes every homicide to be malicious until the contrary appears from the circumstances of alleviation, excuse or justification,

and it is incumbent upon the accused to make out such circumstances to your satisfaction unless they appear from the evidence produced against him."

The jury was also instructed that, "This defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial of this case until and unless the State produces evidence in your presence and hearing sufficient to convince your minds of the guilt of the accused of the crime charged. The State makes the charges set out in this criminal indictment and the burden rests upon the State to establish by proof of the truth of every material allegation in the indictment beyond a reasonable doubt before a verdict of guilty would be authorized." At this point the court explained to the jury the meaning of "a reasonable doubt." Later the court charged, "Now, criminal intent, being an essential element of every crime, is a question of fact to be determined by you whether such criminal intent existed in the mind of this defendant at the time of the alleged crime. Intent can be established by evidence, but it must be evidence which will satisfy your minds beyond a reasonable doubt. Intent may be shown in many ways provided you find it existed from the evidence and testimony

submitted during this trial." Finally, the court instructed the jury that, "If you do not believe the defendant guilty of the offense as charged in the Bill of Indictment, or if you entertain a reasonable doubt as to his guilt, then of course it would then be your duty to acquit him...."

Considering the instructions in the context of the overall charge, Cupp v. Naughten, 414 U. S. 141, 146-147, 149-150 (94 SC 396, 38 LE2d 368) (1973); Boyd v. United States, 271 U. S, 104, 107 (46 SC 442, 70 LE 857) (1926); Agnew v. United States, 165 U. 36, 50 (17 SC 235, 41 LE 624) (1897), we find that reasonable jurors would not have viewed the instructions as mandatory or conclusive, nor would they have understood them as shifting the burden of persuasion to the accused. Skrine v. State, ____ Ga. ____ (Case No. 35213, Decided October 23, 1979; Felts v. State, ____ Ga. ____ (3) (Case No. 34901, Decided October 23, 1979).

9. Appellant complains that the court erred by charging on admission by silence because the charge amounted to a comment on the evidence by the trial judge in violation of Code Ann. § 81-1104. There is no allegation that the law on admission by silence as given was incorrect.

The trial court prefaced the charge with, "[T]he State further contends...." Reading the charge as a whole it is obvious that it was given as a contention of the State, and in no way reflected the opinion of the trial judge. A charge giving the State's contentions does not violate Code Ann. § 81-1104 which forbids the judge to intimate his opinion on the evidence. Pritchett v. State, 92 Ga. 65(7) (18 SE 536) (1893); Mika v. State, 196 Ga. 473(4) (26 SE2d 616) (1943); Mitchell v. State, 134 Ga. App. 376(8) (214 SE2d 593) (1975).

(10) Appellant complains that the trial court erred during the sentencing phase in charging on kidnapping as a statutory aggravating circumstance, when simple kidnapping is not a capital felony. Even assuming that the charge was error, we need not decide whether the death penalty imposed in this case must be set aside on this ground because of our holding in division 11 below. Gates v. State, 244 Ga. 587(7) (_____SE2d _____) (1979).

THE MOTION FOR A REHEARING WAS DENIED TODAY MAR 13 1980

11. Appellant complains that the trial court erred in charging the jury Code Ann. § 27-2534.1(7) which authorizes the death penalty when the offense of murder is found to be outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. We find that the evidence amply supports the charge and the jury's finding of this statutory aggravating circumstance. Appellant's eleventh enumeration of error is without merit.

12. Appellant complains that the trial court erred in its charge on mitigating circumstances. In reviewing the charge, we find that it complies with the requirements laid down in Hawes v. State, 240 Ga. 327(9) (334 SE2d 833) (1977); Spivey v. State, 241 Ga. 477, 479 (246 SE2d 288) (1978); and Godfrey v. State, 243 Ga. 302, 310 (253 SE2d 710) (1979). Appellant's enumeration of error is without merit.

13. Appellant complains the court erred by weighing its sentencing charge in favor of a death verdict. Reviewing the charge as a whole, we find no merit to this argument.

14. Appellant complains that the jury was not impressed with the finality of their decision on the sentencing phase. This argument is meaningless in light of the trial judge's charge that

the court was required by law to sentence the defendant in accordance with the jury's verdict.

SENTENCE REVIEW

As required by Ga. L. 1973, p. 159 et. seq. (Code Ann. § 27-2537(c) (1-3) we have reviewed the death sentence in this case as we have each case in which the death sentence was imposed. Pursuant to the mandate of the statute we have considered the evidence concerning the crime and the defendant and the aggravating cirumstance found by the jury.

We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice or any other arbitrary factor and that the verdict was factually substantiated.

The evidence beyond a reasonable doubt supports the jury's finding of the following aggravating circumstance:[1/]

(1) The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. (Code Ann. § 27-2534.1(b) (7).

Appellant argues that the evidence did not authorize the death sentence. However, the evidence showed a brutal kidnapping

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1/ Assuming the trial court's charge on kidnapping as an aggravating circumstance (Code Ann. § 27-2534.1(b)(2)) was error, see division 10 herein, the jury's finding as to that aggravating circumstance would not prejudice the defendant because the evidence beyond a reasonable doubt supports a finding that the murder occurred during a kidnapping with bodily injury. See, Collier v. State, 244 Ga. 553 (____SE2d____) (1979).

and murder of a 15 year old girl. Appellant admitted the crime to a victim and to a co-defendant in another subsequent kidnapping which the appellant planned and executed. The cold blooded and callous nature of the offense in this case is the type condemned by death in other cases. We find that the evidence is sufficient to authorize the imposition of the death penalty by a rational trier of fact.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed and find that similar cases listed in the appendix support the affirmance of the death sentence in this case. James Richard Patrick's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Hill, J. who concurs in the judgment only.

APPENDIX

Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975)

Davis v. State, 241 Ga. 376 (247 SE2d 45) (1978)

Banks v. State, 237 Ga. 325 (227 SE2d 380) (1976)

Moore v. State, 240 Ga. 807 (243 SE2d 1 (1978)

Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)

Bowen v. State, # 34877, Decided October 3, 1979, ____ Ga. ____

Brooks v. State, # 34813, Decided October 30, 1979, ____ Ga. ____

Col. Tucker v. State, # 34814, Decided November 21, 1979, ____ Ga. ____

Cates v. State, # 35053, Decided October 24, 1979, ____ Ga. ____

PART I: STATEMENT OF CASE

This is a case in which the defendant was convicted of murder on circumstantial evidence and sentenced to death (T-1279-81, R-36-38). This is a direct appeal following denial of a timely motion for new trial (R-43).

On the afternoon of January 11, 1977, 22 year old James Patrick, his wife's cousin Cathy Granger (T-743) and his half-grown shepard puppy, (T-747) Dillon were walking in woods on a 27 acre tract of land (T-1139) owned by Patrick's family. Patrick and the 7 months pregnant Mr. Granger (T-744) were shooting an air rifle at various targets (T-752). Dillon was running around "tr[ying] to hunt" and following trails (T-787).

After their walk Mrs. Granger, believing she had dropped her wallet and keys (T-755), returned to the woods to look for them (T-756) as did Patrick a few minutes later (T-1102). While separated from Mrs. Granger, James Patrick saw his dog become excited over a pile of leaves (T-1103). Under the leaves, Patrick found a body (T-1107). After locating Cathy Granger (T-1108), he ran to a restaurant across the road from the vacant lot and telephoned police (T-803). Several people from the restaurant and adjacent businesses insisted on going to the scene prior to the arrival of the authorities (T-803, 833, 1110). Once there, they removed the leaves to fully reveal the body of a young white female (808-9) tied to a tree with her sweater and brassiere (States Ex I, T-1282).

The medical examiner later testified that the young girl had received approximately 6 blows to the head with a blunt instrument 1 to 1 1/2 inches in diameter (T-1004). Any one of the blows would necessarily have rendered her unconscious (T-1010) and any of three would have been fatal (T-1003).

The only other pathology revealed by the autopsy was

hemorrhage within the pelvis on the outside of the uterus (T-1005). In the opinion of the medical examiner, this could have been caused by "some kind of force or trauma delivered probably to . . . the cervix of the uterus or the pelvis" (T-1006). Possible sources of such trauma mentioned were "instrumentation of the vagina", with any firm object (T-1006) including a finger (T-1014), a kick with a sharp pointed toe to the crotch (T-1006) or any type cushioned blow to the lower pelvis (T-1014) including contact with other objects on persons (T-1014). He also testified that "the vaginal opening appeared to be virginal, there was no evidence of laceration or trauma, it was of unusually small diameter or caliber" (T-1004). There was no sign of injury to the internal surface of the uterus (T-1013). The injuries were not such as would have caused discomfort more severe than menstrual cramps (T-1015) and could have occurred anytime within 24 hours of death (T-1012).* The deceased was a cheerleader, active in sports and enrolled in a physical education class (T-724).

The body was identified as that of 15 year old Gertrula Johnson whose family had reported her missing the previous evening (T-723). Miss Johnson had last been seen around 3:00 p.m. (T-740) by a neighbor (T-727) who had given her a ride to a convenience food store after school (T-729). Although her parents disapproved of smoking (T-720), she purchased a pack of cigarettes at the store (T-731) and planned to walk to her friend's home (T-737) which was located beyond the vacant land (T-736) in which her body was later found. This tract

* This autopsy finding is mentioned here solely for the reason that the trial judge's report stated that the victim had been "sexually molested". This is the only evidence introduced which was vaguely relevant to that contention.

of land lay across the street from a commercial district (T-735) and was bordered by a residential section many of the streets of which dead-ended at the property (T-736). The unfenced land was frequently crossed by school children and others as a neighborhood shortcut (T-736).

On the Monday afternoon of Gertrula Johnson's disappearence, Jimmy Patrick had been at a small roadside record store he operated on one corner of the family property across the street from the commercial district (T-735,1116). In his testimony, the defendant described his activities that afternoon and evening (T-1116-1123). Nothing unusual occurred during that time (T-1116) and Patrick was uncertain of times and chronology (T-1121). According to the testimony of other witnesses, Patrick was at Jackie Castanada's Bird Shop across the street a few minutes before 3:00 (T-1048) and was with Phillip Castanada at the record store sometime before 4:00 (T-882). Young Phillip testified that he had gone to the record shop and waited about 15 minutes for Patrick sometime after 3:00 (T-877). He then checked for him briefly in the barbeque restaurant and returned to his mother's store (T-877). About twenty minutes later (T-878) he went back to the record shop (T-879) and after a while Patrick came up from some where behind the shop (T-879). That direction was consistent with the defendant having come from the garage (T-893) or the woods (T-879). Among the activities to which Patrick testified were carrying out the garbage to a dump behind the garage (T-1119) and lifting weights in the garage for 20 minutes (T-1117). Patrick did not act unusual in any way (T-880). They walked for "a while" (T-879) and Phillip left in time to get to his scout meeting by 4:00 (T-882). The jury was not instructed on alibi.

At defendent's trial, the two men who had led the way

back to the body (T-833, 833) and who had effectively eliminated any possibility that investigators might confirm Patrick's account of the body's appearance (T-808-9) testified. They each said that they saw no indication of the presence of a body prior to their actions in removing the leaves (T-806, 835). They also testified that they had not expected to find a body when they entered the woods, (T-828, 848) and that neither had leaned over for a close look at the pile of leaves (T-817, 836). Over objection, (820-821, 822, 823, 825, 838, 840) each of the men was allowed to testify that, in his opinion, Patrick's emotional response was not genuine (T-822, 825, 840). Later, when the defendent took the stand, the court prevented him from describing his feelings during these events (T-1112-3).

At all times during Monday afternoon and evening and Tuesday morning Jimmy Patrick's appearance, manner and conduct were altogether normal (T-772, 780, 880, 1049, 1053, 1075). After finding the bloody body of Gertrula Johnson, Jimmy Patrick was extremely upset (T-791, 1054, 1075, 1080). His emotionality continued to one degree or another for several days (T-792, 794, 1054, 1075).

On January 26 arguments over financial difficulties resulted in Jimmy Patrick being told by his wife to leave their home (T-1057, 1125). A few days later, on February 1, Patrick and a male and female companion planned and carried out a kidnapping (T-1127-8).

The defendant and Ms. Pat Tarkington, used a BB pistol (T-946) to force 13 year old Kelly Maley to get in their rented (T-1170) automobile (T-940). They then took her to Robert Montgomery's apartment (T-946) where she was held until a ransom was paid. At various time, she was in a large closet (T-948) or the bedroom watching TV (T-954). On several

occasions she was alone with Patrick (T-950, 968) but was never injured or physically abused in any way (T-950, 972). During the time that Miss Maley was in the apartment, Patrick made a number of statements to her:

> That "the organization" had kidnapped a boy and had sent the child's little finger to his rich father (T-952-3).
>
> That he needed money for medicine for his son who had leukemia (T-950).
>
> That he didn't believe her mother had taken his ransom demand seriously (T-949).
>
> That she would be killed if the ransom were not paid (T-950).
>
> That "the organization" had kidnapped Truly John and beat her to death with a baseball bat after driving her by her house and deciding her family wasn't rich enough (T-953).
>
> That she would be released unharmed when the ransom was paid (T-959).

Patrick admitted that he said these things to make his hostage take the ransom demand seriously and to make her afraid of crying out if she heard other people in the apartment (T-1129).

After receiving the ransom money under the watchful eye of the FBI and others, Patrick returned to the apartment, exclaiming "we got away with it," and throwing the money around and "jumping for joy" (T-961). Shortly thereafter Miss Maley was blindfolded (T-963) and driven to a store near her home by Montgomery and Patrick (T-965). During the trip Montgomery warned her that "the organization" would kill her if they were caught (T-970). As she got out of the car, Jimmy Patrick kissed her on the cheek and wished her luck (T-971).

After Kelly Maley's release, Jimmy Patrick took his share of the money home to his wife (T-1131). In the early hours of the morning, police kicked in their bedroom door (T-1025) and put a gun to Patrick's head (T-1025). Patrick and his wife were nude (T-1060). Five or more police officers were in the room (T-1025). The officer holding the gun to the defendant's head testified that he informed Patrick that he "was arrested for the kidnapping of Kelly Maley, and he would probably be later charged with the murder and rape of Truly Johnson" (T-1025). He further testified that the defendant "said he didn't rape the little girl" (T-1026). Then, according to the officer's testimony, Marjorie Patrick, who was standing on the other side of the bed wrapped in a sheet (T-1038), said "Did you kill that little girl"?, to which the defendant made no response (T-1026).

Testimony of a second officer corroborated the statement by the first officer and question by Mrs. Patrick, but not the defendant's response (T-1037). The second officer reported hearing Patrick saying "something about murder and rape" (T-1037). As Patrick was led out of the room he continued to ask "What's this stuff about murder and rape?" The officer testified that he was told "that he would probably be charged too with the murder and the rape of the Johnson girl, and he said that he didn't rape anybody" (T-1038).

The jury was later instructed that the defendant's silence or failure to make a denial at the time of his arrest could be found by them to be an admission if they found that he heard the question of his wife and the statement of the officer and all circumstances required an answer or denial (T-1249-50). Although Mrs. Patrick denied asking any such question (T-1069) and the second officer's testimony indi-

cated a denial was made by the defendant (T-1037) the jury was not instructed that they were also to determine whether the question was asked and whether in fact the defendant was silent.

No confessions to police were offered, nor was any physical evidence tending to connect the defendant with the crime introduced. Testimony of several witnesses established that the defendant's clothing on the day of Miss Johnson's death was unstained (T-1056, 1075, 1084) and that he would have had no opportunity to change. None of his clothes was missing (T-1056). Two searches of defendant's store and adjacent garage failed to produce any evidence (T-713).

Following his arrest for kidnapping, Robert Montgomery was held in jail (T-986). Although he had an attorney, he was interviewed without counsel in the jail by at least two detectives (T-987). Subsequently, Montgomery, through his attorney, began negotiations for a reduced sentence based partly on an offer to connect Patrick to the murder case (T-991). Several weeks after his initial incarceration, Montgomery gave police a statement inculpating Patrick (T-987), 991-2). At trial Montgomery gave the following testimony:

> And I told him that he was going to get caught. Then he said, "No, I'm not, I've got this figured out, I'm not going to mess it up like I did the last one."
>
> I asked him what he meant by that, and before anything he said, "I'm going to tell you something, I don't want you to tell anyone else."
>
> I said, "Okay."
>
> And he said, "You remember that girl I found?"

And it was the day earlier that we talked about the crime in that area on Buena Vista Road, he told me about finding the little girl behind Pritchett's.

So he said, "You remember that girl I found?"

And I said, "Did you kidnap her?"

And he said, "Yeah."

Well, at first he didn't answer, he sort of hesitated, and I asked him again. Then I asked him if he killed her, and he was busy getting stuff out of the refrigerator, and he didn't answer right away. So, I pushed it along and I asked him again, and he turned around and shook his head and said, "Yeah."

And I asked him why. And he said, "She wouldn't cooperate, she started screaming, and she wouldn't shut up." (T-980-1)

In April, to Montgomery's knowledge, Patrick and Tarkington were sentenced to life and 20 years respectively for the kidnapping of Kelly Maley (T-994). Six months later, at the time of trial, Montgomery had not yet been sentenced (T-994, 9849) for his part in that offense.

In late March, other inmates of the Muscogee County Jail staged an escape and Patrick followed them out (T-1191). At that time, a motion was pending to acquire physical evidence from the defendant and the jury was charged that they might consider the escape as flight (T-1250). At the same time, defendant was aware of the inevitability of a life sentence for kidnapping (T-1041, 1191). Following his escape, Patrick called his wife (T-1061) and hid under her cousin's house

until recaptured. No evidence was introduced to show an effort to leave the jurisdiction.

James Patrick testified at his trial (T-1091 - 1199). He admitted the statements made to Kelly Maley and explained how those statements furthered the kidnapping scheme (T-1129). He denied making the statements claimed by Montgomery (T-1131, 1132). He denied killing Gertrula Johnson (T-1135). Defendant placed his character in issue and produced witnesses to his previous good character (T-1200, 1206, 1213). Apart from the kidnapping and escape episodes, the state presented no bad character evidence.

IN THE SUPREME COURT OF THE STATE OF GEORGIA

JAMES RICHARD PATRICK :

VS : DOCKET NUMBER 35200

THE STATE :

MOTION FOR REHEARING

COMES NOW, JAMES RICHARD PATRICK, appellant, and respectfully moves this court to withdraw its opinion of January 24, 1980 and reconsider Divisions Ten and Eleven and the Sentence Review contained in that opinion. As Grounds for his motion, defendant shows that the specified portions of the opinion contain significant errors as more completely set out below.

AS TO SENTENCE REVIEW

The statutory scheme for imposition and review of the death penalty devised by the Georgia Legislature (Acts 1972, pp 159ff) and approved by the United States Supreme Court (Gregg v. Georgia, 428 U.S. 153, 1976) has, as one of its central componants, the requirement that this court determine

> [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and defendant
>
> Code Ann. §27-2537(c)(3)

For purposes of this comparison, the legislature specified that, "the court shall accumulate records of all capital felony cases in which sentence was imposed after January 1, 1970 ...."

This legislation requires that each death penalty case be compared to other capital cases within the specified time period without regard to whether sentences followed jury trials, bench trials or guilty pleas and without regard to whether the cases were appealed. A finding that a death sentence was not disproportionate when compared to such cases would tend to reduce the impact of such potentially arbitrary factors as prosecutorial discretion and varying local community attitudes. The legislative intent was quite obviously to assure a substantial degree of uniformity throughout the state in the handling of capital cases to the end that imposition of the death penalty would no longer be arbitrary and capricious.

The procedure for review employed by this court does not satisfy the letter or the spirit of the statute. This court has instead compared appellant's case with "the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed" (Patrick v. State, Docket No. 35200, opinion of January 24, 1980). In so doing, this court has ignored all of those cases in which sentence was imposed but no appeal taken. Since the effective date of the 1972 statute, those cases are necessarily cases in which the sentence was life imprisonment. Prior to that date, it may logically be presumed that few if any death sentences were not appealed. Logic would also suggest that plea-bargained life sentences would be the least likely type of case to be appealed.

The group of comparison cases selected by this court's

D-2

method must differ materially from the group of cases specified by the legislature. By failing to include plea-bargained and other non-appealed life sentences in their proportionate numbers, this comparison is substantially biased in favor of the death penalty -- a bias which was not intended by the legislature.

Defendant respectfully requests that the opinion in this case be withdrawn and that new comparison cases be selected in accordance with the mandate of the Georgia legislature before defendant's sentence is finally reviewed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1979

No. 79-6745

JAMES RICHARD PATRICK

PETITIONER

V.

THE STATE OF GEORGIA

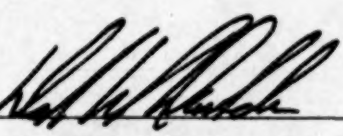
RESPONDENT

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, James Richard Patrick, who is now incarcerated in the Muscogee County, Georgia Jail, asks leave to file the attached petition for certiorari to The Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis.

The Petitioner's affidavit in support of this motion is attached.



Deryl D. Dantzler
Attorney for Petitioner

c/o Mercer Law School
Macon, Ga. 31207
(912) 745-6811

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6745

JAMES RICHARD PATRICK

PETITIONER

V.

THE STATE OF GEORGIA

RESPONDENT

AFFIDAVIT

I, James Richard Patrick, Petitioner, being duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees;

1) I am unable to pay the costs in this case or give security therefore because of my poverty
2) I believe that I am entitled to the redress I seek in said case
3) The nature of this case is that I have been sentenced to death for the offense of murder, which sentence has been affirmed by the Supreme Court of Georgia.

James Richard Patrick

James Richard Patrick

Sworn to and subscribed
before me this 23rd
day of May, 1980

Notary Public
My Commission expires 9/30/82